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NOTE AND COMMENT.

THE USE OF MULTIPLES IN DETERMINING THE VALUE OF RAILROAD LANDS.—The case of *Chicago & N. W. Ry. Co.* v. *Smith et al.*, decided by the United States District Court for the District of South Dakota and reported in 210 Fed. 632, contains an interesting suggestion as to the means to be employed in determining the value of lands used for railway purposes, which was not, however, accepted by the court.

Property devoted to a public service occupies a peculiar place in the sphere of property law; the very fact that it has been put to a use in which the public has an interest renders it liable to public control, a control which extends to the power of regulating the rates that may be charged for its use, *Munn* v. *Illinois*, 94 U. S. 113. At the time when the problem first assumed some measure of importance it was considered that this power of regulation was exclusively a legislative one, and that the exercise by the legislature of this power precluded the courts from interference. They were thought to be powerless to prevent an abuse of this power by the legislature. After some uncertainty in the courts on this point, the doctrine of the right of judicial review finally prevailed, and it became the settled law that the courts had the right to declare the exercise of this power by the legislature invalid as

being in contravention of the constitutional provision against depriving a person of property without due process of law. *Spring Valley Water Works* v. *Schottler,* 110 U. S. 347; *Railroad Commission Cases,* 116 U. S. 307; *Chi., M. & St. P. Ry. Co.* v. *Minn.,* 134 U. S. 418. Once this doctrine had been established, it became essential to determine just what would constitute a taking of property without due process of law. It was at once recognized that this was intimately connected with the question of the value of such property and the rate of return that would be allowed on such value. Consequently whether or not property is being taken without due process of law is soon made to depend upon whether or not the regulations imposed resulted in depriving the owner thereof of a fair rate of return on its fair value. *Smyth* v. *Ames,* 169 U. S. 466; *San Diego Land & Town Co.* v. *National City,* 174 U. S. 739. But it is apparent that this rule itself raises difficult questions, both in the matter of its practical application and in the matter of the theoretical problems that it raises. These difficulties have centered about the determination of what constitutes fair value and what constitutes a fair rate of return. By far the most difficult of these problems have arisen in connection with the former of these questions. The particular problem presented in the following discussion is merely one of the many that have come up. In view of the fact that it has now been definitely and have obtained some measure of legal recognition: namely, the actual settled that in most cases the question is a judicial one, it must be to the decisions of the courts on these points that one must look for an answer to the various questions so raised.

It is the settled rule that as a general thing public service companies are entitled to earn a fair rate of return on the fair value of the property being devoted to a public use, and that such fair value is the value of the property at the time that it is being so used for the public benefit. *Smyth* v. *Ames,* 169 U. S. 466. This rule, however, is little more than the statement of the general outlines of the problem, and leaves unanswered the question as to the method that is to be used to determine such present value. Various answers have been given to this question, the most important of which may be summed up in the various theories of valuation that have been proposed and have obtained some measure of legal recognition; namely, the actual cost theory, *Brymer* v. *Butler Water Co.,* 179 Pa. 231; the market value theory; and the cost of reproduction less depreciation theory. *San Diego Land & Town Co.* v. *National City,* 74 Fed. 79; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1. For a general discussion of the various legal theories for determining present value see *Advance in Rates—Eastern Case,* 20 I. C. C. Rep. 243, at pp. 260-263. If either the actual cost or cost new theories be adopted the question as to what shall be considered legitimate elements in cost arises, and in connection with each of such recognized elements the further problem emerges as to the methods to be used in determining their value. The question relative to the use of multiples in valuing the right of way of railroads is merely a particular case of this larger problem. Before proceeding to discuss this problem it may be well to state it as it has presented itself in the court for solution.

Up to the present time there have been very few cases in which the problem has been directly faced. The most prominent of these are the *Minnesota Rate Cases,* both as reported in 184 Fed. 765 and later in 230 U. S. 352, and the principal case. In order to present the problem as it appeared to the court in the former of these cases it may be best to summarize the court's view as reported at pp. 442 to 450. First the value of contiguous property was determined. To this was added a sum to cover "excess which the railroad would have to pay over the market value of contiguous and similar property if it were called upon to undertake such a reproduction of its right of way." "These supposed additional outlays he (the witness for the railroad) undertook to estimate. For this purpose he increased the 'market value' as stated (in the case of agricultural lands generally multiplying by 3) and thus reached the amount set down as the 'value for railway purposes.'" In the latter case at pp. 636 to 639, the value of contiguous property was determined. This was called the "market value." The values so reached were multiplied by 2½ to determine the cost of reproduction value for the purpose of giving the actual cost to the company of acquiring them under present conditions. From these cases it is apparent that the general features of the method are the taking of the value of contiguous property as a base and applying a multiple to this base for the purpose of reaching such a figure as will represent the actual cost to the railroads of acquiring the right of way under present conditions. Before discussing the legitimacy of this proceeding the legal status of the method in so far as it has been passed upon must be stated. In the *Minnesota Rate Cases* their use was rejected, although there may be some doubt as to whether this was done on principle for the purpose of laying down a general rule that the method was illegitimate, or whether because of the fact that the railroads had not made out a sufficiently strong case to warrant their use in the particular case then before the court. In the latter case, however, though commenced before the decision in the *Minnesota Rate Cases* in the United States Supreme Court had been announced, was decided later, it was also decided not to allow their use. It is perhaps too early to consider the problem as one definitely settled in the law, but in so far as the actually decided cases furnish any clue to the probable ultimate solution, it would seem that the chances of allowing their use are not very favorable.

As was stated in the preceding paragraph, the attempt to use the multiples is an effort to apply the cost new theory to its fullest measure to the problem of right of way values. It is apparent from the statement of the purpose sought to be accomplished thereby that it is based upon an assumption that it would actually cost the railroads this excess to acquire the property today. This is an assumption of fact whose legitimacy can be tested only by an appeal to experience. In support of this assumption of fact is the testimony of the various witnesses for the railroads quoted in the cases now under discussion. It would also seem to be the opinion of persons familiar with actual experience in connection with the problem. There are various reasons given for this state of affairs. A brief summary of these is essential to an understanding of the problem, and for this purpose it may be well to quote

from an expert on railroad valuation: "Thus, with a railroad right of way, the continuity of the strip of lands, the severance of lands crossed by it, the greater earning power it derives from the constructions placed upon it, in short the uses to which it can be put, give it a value far in excess of adjoining lands. * * * In making these figures the appraiser was forced to the following conclusions: That the added value for railroad purposes is due to three elements; continuity, severance or damages, and changed earning power, all of which the farmer or owner has cognizance of in making his price." (H. E. RIGGS, THE VALUATION OF PUBLIC SERVICE CORPORATION PROPERTY, 54-55.)

But even if it be admitted that as a matter of fact railroads are compelled to pay a price in excess of market value of contiguous lands for farming or other purposes, in such cases where the transactions are voluntary ones between the parties, it does not necessarily follow, even on the assumption of the cost new theory, that it should be allowed. As the court says in the *Minnesota Rate Cases* referring to the use of multiples for such purpose, "It is apparent at once that, in so far as the estimate rests upon the supposed compulsory feature of the acquisition, it cannot be allowed," for, "It (the railroad) is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege to prevent advantage being taken of its necessities." Whether, therefore, the use of multiples is essential, even on the basis of the cost new theory, depends upon whether the elements that would be taken into consideration in determining the value of the lands in condemnation proceedings by the railroad, are the same as those that would be considered in a voluntary transaction between the parties in respect to the same lands. No proper answer can be given to this question until it has been determined what are proper elements in arriving at the value of lands. What the party selling is entitled to is the fair market value of the property sold, and as a general thing, "compensation to the owner is to be estimated by reference to the uses for which the property is available." *Boom Co.* v. *Patterson,* 98 U. S. 403. In connection with the particular problem in hand, the controversy centers about the right to include in reaching such value the particular value for railroad purposes; and, if this is to be allowed, about the extent to which it should be considered. The extent to which it would be legitimate to consider it would certainly be limited by the rule against allowing speculative factors to be considered. *Chi., B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226; but it would no doubt be included to the extent that the possibility of its use for that purpose had gone beyond the domain of the purely speculative and found expression in the actual market value of the property in question, *U. S.* v. *Chandler-Dunbar Co.,* 229 U. S. 3. To the extent, therefore, that a proper consideration of the elements out of which this excess value for railroad purposes arises, is permitted in condemnation proceedings, and to the extent that these would result in a price in excess of the value of contiguous lands for other purposes, a strict application of the cost new theory would warrant a valuation in excess of the value of contiguous property, and consequently would warrant the use of a proper multiple to arrive at such a value.

It may be well at this point to remark that it is not so much a question as to whether the cost new theory as opposed to the actual cost theory, shall be applied in this field, but rather a question as to the extent to which the cost new theory shall be used. For it is generally held that, regardless of the actual cost of such lands, their present value shall be allowed in rate cases in so far as such present value is reflected in the value of contiguous property. *Wilcox* v. *Con. Gas Co.,* 212 U. S. 19. This is generally allowed on the theory that public service companies shall be allowed to share in the prosperity of the community as well as private individual landholders. It may be doubted, however, whether, if the facts are such that such companies pay more than the ordinary market value, they are sharing in such prosperity in the same degree unless the same rate of excess is allowed in reaching present value of the land factor that represented the actual excess at the time it was purchased. But there is even some question as to whether they shall be allowed this increase in the values of their lands under all circumstances. The case cited above remarks, "This is, at any rate, the general rule. We do not say there may not be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public." The same problem was discussed but not decided in *Spokane* v. *N. P. Ry. Co.,* 15 I. C. C. R. 376, and in the *Advance in Rates-Western Case,* 20 I. C. C. R. 307. 340. In the latter of these cases it is stated, "If the position of the Burlington is sound, and is an expression of what the courts will hold to be the law, then as we are told there is certainly the danger that we may never expect railroad rates to be lower than they are at present. On the contrary there is the unwelcome promise made in this case that they will certainly advance." If then, even without the use of multiples, such dire consequences are to be expected, the consequences involved in permitting the use of multiples can only be imagined in this connection.

Such is one of the many difficult problems that the courts have had to confront in working out justice in the matter of rates between the public service companies and the public. There can be no doubt that they have been guided in their work by considerations of the best public policy. For the problem is one that is connected in the most intimate measure with the problem of securing the proper development of a large branch of economic life and activity. As such it presents rather a problem of laying down lines for the future development than a question of past policy. As long as the country is equipped with less than its fair complement of transportation facilities, with the consequent necessity of a further development along this line, the courts must recognize that the manner of treatment dictated by considerations of public policy, must be such as will result in securing such a development. And is impossible unless the conditions are made favorable for attracting to those industries sufficient enterprise and capital to undertake this development. And this will in a large measure depend upon the extent to which property in those lines receives the same consideration that is given property in other lines of industry. It is at this point that the necessity of a proper solution of the various questions connected

with the valuation of public utility properties finds its crux, and it is considerations such as these that must for a long time continue to have a decisive influence in determining the rules of law connected with such problems.

H. R.

JURISDICTION OF STATE COURTS IN SUITS COMMENCED BY RECEIVERS APPOINTED BY FEDERAL COURTS.—In *Delano, et al., Receivers of Wabash Railroad Company,* v. *Malcomson-Houghten Coal Company,* (Mich. 1914) 21 Detroit Legal News, 905, the plaintiffs had been appointed Receivers of the Wabash Railroad Company by order of the United States District Court for the District of Missouri. Their appointment had been continued in Michigan over the lines of the Wabash Railroad Company therein by ancillary proceedings taken in the District Court of the United States for the District of Michigan. The Wabash Railroad was the owner of certain leased real estate within the City of Detroit. The Receivers were anxious to obtain possession of the premises and accordingly instituted summary proceedings for the vacation of the premises by the defendant, the summary proceedings being taken under the Michigan statute before a Circuit Court Commissioner, an officer of the State Court. The plaintiff obtained judgment for restitution, and the case was appealed through the Circuit Court to the Supreme Court of the State, one assignment of error being that the State Court had no jurisdiction of the subject-matter of the action, but that the suit should have been brought in the United States Court upon the grounds stated in defendant's brief as follows:

"By taking possession, the United States Court acquired exclusive jurisdiction of the premises and this jurisdiction carried with it the exclusive right to determine all judicial questions relating to the possession of the premises, and withdraws the property from the jurisdiction of the state courts so far as the power of the latter to determine questions affecting the rights of parties and privies to the suit in which the receivers were appointed is concerned."

The defendant then cited the following cases in support of the above statement: *Farmers' Loan & Trust Co.* v. *Lake Street Elevated Railroad Company,* 177 U. S. 51; *Wabash Railroad Company* v. *Adelbert College,* 208 U. S. 38; *Murphy* v. *John Hofman Company,* 211 U. S. 562; *Palmer* v. *Texas,* 212 U. S. 118; *Sullivan* v. *Algrem,* 160 Fed 366; *City of New Orleans* v. *Howard,* 160 Fed 393; *McKay* v. *Van Kleeck,* 133 Mich. 27; *Prather Engineering Company* v. *Genesee Circuit Judge,* 149 Mich. 53; *Premier Steel Company* v. *McElwaine-Richards Company,* 144 Ind. 614.

On the part of the plaintiff, however, it was argued that Receivers appointed by the Federal Court had the same right as other citizens to enforce their rights, and the rights of the corporation of which they are Receivers, within the territorial limits of the jurisdiction of the Court from which they derived their appointment, or in any court or courts of competent jurisdiction. The writer has searched the authorities for a case precisely in point, but has met with no success. However, it is submitted that none of the cases cited by the defendant, supra, are authorities for its position,